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DISPUTE: A SOLUTION OR CREATING ANOTHER PROBLEM?**

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## CREATING A SERVITUDE TO SOLVE AN ENCROACHMENT DISPUTE: A SOLUTION OR CREATING ANOTHER PROBLEM?

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### 1 Introduction

In terms of the South African common law, a landowner affected by an encroaching structure erected by his neighbour can approach a court and seek an order for removal of the encroachment.<sup>1</sup> The basis for the common law remedy of removal is the right to be free from any inference in the use and enjoyment of your property.<sup>2</sup> Nonetheless, it is clear that courts have the discretion - in as yet undefined instances - to decide in favour of leaving an encroaching structure in place in exchange for compensation.<sup>3</sup> However, courts have consistently failed to explain what happens in terms of the rights of the respective parties after an order is made where the encroachment remains in place.<sup>4</sup> In most of the decisions in which the discretion was exercised in favour of keeping the encroachment intact, courts would either incorporate the power to order transfer of the encroached-upon land together with the discretion to deny demolition of the encroachment,<sup>5</sup> or say nothing about the rights of the respective parties if the encroachment remained in place. Both of these outcomes are problematic.

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<sup>1</sup> Van der Merwe *Sakereg* 201. The remedy of removal has its historical origins in Roman law. See D 9 2 29 1. See also Wille *Principles* 151; Van den Heever *Aquilian Damages* 84; Milton 1969 *Acta Juridica* 234; Hall *Maasdorp's Institutes* 38, 41, 94.

<sup>2</sup> Milton 1969 *Acta Juridica* 241; Van der Merwe and Cilliers 1994 *THRHR* 588. See also *Wade v Paruk* 1904 25 NLR 219 225; *Smith v Basson* 1979 1 SA 559 (W) 560.

<sup>3</sup> *Rand Waterraad v Bothma* 1997 3 SA 120 (O) (hereafter *Rand Waterraad (O)*) 130; *Trustees, Brian Lackey Trust v Annandale* 2004 3 SA 281 (C) (hereafter *Brian Lackey Trust (C)*) paras 17-31; *Phillips v South African National Parks Board* 2010 ZAECHGHC 27 (hereafter *Phillips (ZAECHGHC)*) para 21.

<sup>4</sup> Temmers *Building Encroachments* 109-111.

<sup>5</sup> *Christie v Haarhoff* 1886-1887 4 HCG 349 354; *Van Boom v Visser* 1904 21 SC 360; *Meyer v Keiser* 1980 3 SA 504 (D). See also Van der Merwe *Sakereg* 202-203.

The first outcome is problematic because the actual authority for making such an order is uncertain.<sup>6</sup> In this regard, the power to order transfer of ownership of the affected land must be separated from the general discretion to replace injunctive relief with compensation.<sup>7</sup> It should be kept in mind that if the encroachment is allowed to continue and the court also orders that the land encroached upon should be transferred to the encroacher, the affected landowner would be forced to give up his property against his will. Apart from the fact that there is no authority at common law that authorises the transfer of ownership in this regard, this result generally has far-reaching implications.<sup>8</sup>

The second outcome - where courts remain silent as to the rights of the respective parties if the encroachment is left intact - is likewise problematic. This is the case because of the uncertainty that it causes in terms of the title of the land and the entitlement (or use) with regard to the land.<sup>9</sup> In these instances, it seems as though a use right is indirectly created in favour of the encroacher when the encroachment is not removed.<sup>10</sup> This would mean that the encroacher is allowed to continue exercising possession of the affected land, but the exact nature of the right is not clear, causing some doctrinal confusion.<sup>11</sup>

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<sup>6</sup> Temmers *Building Encroachments* 95-99.

<sup>7</sup> Temmers *Building Encroachments* 109-111. See also Boggenpoel 2013 *THRHR* 319, where it is argued that court orders that cause the transfer of the affected land to the encroacher would have difficulty in complying with s 25(1) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

<sup>8</sup> Temmers *Building Encroachments* 95-99; Boggenpoel 2013 *THRHR* 319-320.

<sup>9</sup> This is even more problematic when dealing with building works partly erected on the land of another. The accession hurdle then needs to be overcome. In this regard, it becomes important to explain how one person owns the land and another person owns the building works erected on that land. See Temmers *Building Encroachments* 110.

<sup>10</sup> Temmers *Building Encroachments* 110.

<sup>11</sup> Besides the doctrinal difficulty with explaining what happens when the encroachment is not removed, there are all sorts of spill-over effects that could arise. Who will pay municipal tax on the part of the property affected by encroachments? Should an indication be made of the encroachment in the title deeds of the respective owners? Will the compensation take into account the loss of the affected land or a use right with regard to the land, and if so, what difference would it make in the actual compensation? Also, is the value by which the affected property is decreased as a result of the existence of the encroachment taken into consideration at all? See Temmers *Building Encroachments* 137.

Interestingly, the recent decision of *Roseveare v Katmer, Katmer v Roseveare*<sup>12</sup> provides a novel (third) approach to the problem of explaining the rights of the parties to the affected land in instances where an encroachment is left intact. In *Roseveare* the court ordered that a servitude should be created in favour of the defendant in respect of the portion of a wall that was left in place in terms of the discretion.<sup>13</sup>

There are a few interesting aspects of the judgment that will be addressed in this note, especially in as far as the case provides an alternative solution to the encroachment problem. Firstly, it is necessary to set out the facts of the *Roseveare* decision with the specific aim of highlighting the alternative outcome that the case provides for encroachment law. Thereafter, the focus will shift to the way the discretion was exercised in the case. In this regard, it will be important to briefly mention one aspect of nuisance law that was important in the exercise of the court's discretion. The judgment specifically highlights the apparent irregularity in the reasonableness arguments that inform judicial discretion in the case of encroachment disputes as opposed to the reasonableness standard that forms the cornerstone of nuisance law. Accordingly, it is necessary to compare the meaning of reasonableness as alluded to in the context of encroachment on the one hand, and reasonableness as meant in the context of nuisance law on the other. It is crucial to distinguish between the use of reasonableness within the different contexts of neighbour law especially for purposes of determining how the discretion is exercised in the case of encroachment law. Finally, attention will be drawn to the outcome of the *Roseveare* decision. To this end, it is essential to evaluate the outcome from a traditional private law perspective and in terms of the possible constitutional consequences that may be implicated by the decision. It is argued here that although the decision may have attempted to provide clarity with regard to the problem of explaining the rights of the respective parties if the encroachment was left intact, the outcome in *Roseveare* is not without problems.

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<sup>12</sup> *Roseveare v Katmer, Katmer v Roseveare* 2013 ZAGPJHC 18 (hereafter *Roseveare (ZAGPJHC)*).

<sup>13</sup> *Roseveare (ZAGPJHC)* para 24.

## 2 The *Roseveare* decision: An alternative outcome

This decision concerns a dispute between two neighbours living in a suburb in Johannesburg. The dispute is based on two issues: In the first place, there is disagreement over an encroaching boundary wall, and secondly, there is an allegation of nuisance purportedly caused by the defendant's peacocks. The defendant was initially the owner of both properties before she subdivided the land and sold off the vacant stand to the plaintiff. When the plaintiff commenced with building works on his property, he became aware that the boundary wall situated between the properties was incorrectly demarcated. In one place a cherry tree - which was standing on the boundary line - caused a kink in the wall and resulted in a portion of the plaintiff's property being incorporated as part of the defendant's land. The extent of the encroachment differed depending on where on the boundary line the encroachment was measured. It was clear that the encroachment intruded on the plaintiff's property to the greatest extent where the cherry tree stood.<sup>14</sup> It was estimated that the encroachment had the effect of appropriating approximately twenty square metres of the plaintiff's land and although the tree itself was only slightly included as part of the plaintiff's land, it was clear that the roots of the tree formed part of both properties.

The plaintiff claimed that he became aware that this kink in the boundary wall resulted in an encroachment only when he began building on his land and although he agreed that the tree should not be cut down, he was less accommodating with regard to the patently unsightly kink and the misappropriation of his property that was caused by the encroaching wall.<sup>15</sup> Therefore, he proceeded with the demolition

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<sup>14</sup> *Roseveare (ZAGPJHC)* para 6.

<sup>15</sup> Interestingly, the sale agreement between the plaintiff and the defendant contained an annexure in terms of which the plaintiff acknowledged that he was aware at the time the property was purchased of the fact that the boundary wall made this kink to accommodate the cherry tree standing on the border between the properties. In terms of this agreement, the plaintiff agreed to protect the cherry tree in perpetuity. The defendant relied on this annexure to argue that the plaintiff agreed to have the boundary wall permanently remain intact and consequently waived his right to expect the defendant to rectify the kink. In contrast, the plaintiff averred that he and the defendant had come to a subsequent agreement concerning the straightening of the wall where the cherry tree stood. However, the defendant denied that any agreement to this effect had been concluded. See *Roseveare (ZAGPJHC)* paras 9-10.

of the wall between the properties but was interrupted when the defendant instituted an urgent application to prevent him from continuing with the demolition. Consequently, the plaintiff brought a counter application on the basis of the nuisance which he argued resulted from the defendant's peacocks and he also sought demolition of the encroaching wall.<sup>16</sup>

There were essentially two issues that needed to be addressed by the court. Firstly, there was the encroachment dispute, where the question was whether the court should exercise its discretion in favour of the plaintiff (in which case the encroachment would be removed by rectifying the wall) or in favour of the defendant (where the encroachment would remain intact and compensation would be awarded instead). The second issue was the nuisance allegedly caused by the defendant's peacocks.<sup>17</sup>

With regard to the encroachment issue, the court confirmed that courts generally have a discretion in the case of encroachments to order damages instead of the removal of the encroaching structure.<sup>18</sup> Furthermore, it was emphasised by the court that the discretion in this context is wide and equitable and dependant on the circumstances in the particular case. In this regard, the court reasoned that there were three different areas that were all differently affected by the encroaching wall.<sup>19</sup>

The boundary wall situated north of the kink was found to constitute a significant encroachment; the court therefore held that demolition of that part would have to take place.<sup>20</sup> Similarly, the part of the boundary wall situated at the kink was found

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<sup>16</sup> *Roseveare (ZAGPJHC)* para 4.

<sup>17</sup> In terms of the nuisance allegations, the court found that the peacocks indeed created a nuisance and the problem had to be addressed. In this regard, the court came to the conclusion that the plaintiff was within his rights according to the municipal by-laws to require that the peacocks and peahens that entered onto his property be removed by the City of Johannesburg or alternatively by the Society for the Prevention of Cruelty to Animals. See *Roseveare (ZAGPJHC)* paras 17 and 24.

<sup>18</sup> *Roseveare (ZAGPJHC)* para 15. For a discussion of the discretion in the context of building encroachments, see Temmers *Building Encroachments* 50-57.

<sup>19</sup> *Roseveare (ZAGPJHC)* paras 5, 16.

<sup>20</sup> *Roseveare (ZAGPJHC)* para 16.

to be so intrusive that it had to be pulled down.<sup>21</sup> However, in relation to the remaining part of the boundary wall (in other words the part situated below the kink), the court ordered that that part should remain in place supposedly because of the insignificant extent of the encroachment. Therefore, the exercise of the discretion in this case seems to have been based purely on the size of the encroachment. In the end, the court ordered that a servitude should be created in respect of the encroaching wall that would remain intact.<sup>22</sup>

One concern with the judgment in terms of the way in which the discretion was exercised is the apparent inconsistency in the use of reasonableness arguments when judicial discretion is exercised in encroachment disputes, compared with the reasonableness standard that is central in nuisance law. It is necessary in the following section to highlight the important distinction between the meanings of reasonableness in the two contexts of neighbour law.

### **3 The meaning of *reasonableness* in the context of encroachment and nuisance law**

The reasonableness standard is seen as the fundamental basis of nuisance law.<sup>23</sup> It is an objective standard that requires reciprocity, mutual respect and neighbourly forbearance. On the one hand, it means that one owner is required not to exceed the limits of his rights and unlawfully infringe upon the rights of his neighbour. On the other hand, the standard also requires reasonable tolerance in respect of the use of neighbouring land. Furthermore, the idea of reasonableness rests on the assumption of otherwise normal and lawful use of one's property, which in particular instances goes too far and exceeds what a neighbour can be expected to tolerate. This is generally how the principle of reasonableness is understood and applied in nuisance law.

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<sup>21</sup> *Roseveare* (ZAGPJHC) para 16.

<sup>22</sup> *Roseveare* (ZAGPJHC) para 24.

<sup>23</sup> Van der Merwe *Sakereg* 193.

In the context of the law regulating encroaching structures, there has also been reliance on the neighbour law concept of reasonableness to explain or justify exercising the judicial discretion in favour of leaving an encroachment in place. The way in which the earlier encroachment decisions of *Rand Waterraad v Bothma*<sup>24</sup> and *Trustees, Brian Lackey Trust v Annandale*<sup>25</sup> used the reasonableness standard in the context of encroachment law results in the conclusion that courts may apply the normal manner of dealing with neighbour law cases, as explained above, to encroachment disputes.

In *Rand Waterraad*, the court confirmed in the context of encroachments that courts must always endeavour to harmonise the neighbouring owners' property interests when it seeks to solve encroachment disputes.<sup>26</sup> This was confirmed in *Brian Lackey Trust* where the court highlighted that the aim of neighbour law is to achieve harmony in the relationship between neighbours when conflict arises between the respective owners' interests.<sup>27</sup> Therefore, it seems in both instances that the various courts dealing with encroachment disputes appealed to nuisance law principles to justify the exercise of their discretion in favour of ordering compensation rather than the removal of an encroaching structure. Similarly, this was illustrated in *Roseveare* where the court discussed the discretion in the case of encroachments and referred to the *Allaclos* decision, which clearly dealt with the question of reasonableness in the context of nuisance law.<sup>28</sup> However, it is not clear that an encroaching owner's conduct would pass the reasonableness test if the principles of nuisance law were applied strictly to encroachment quarrels. A question that may be relevant in this regard is: Should a reasonable objective person be prepared to accept an encroachment which condemns him to the effective loss of the use and enjoyment of his land in the same way that the person should be willing to tolerate a certain level of noise from neighbouring land?

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<sup>24</sup> *Rand Waterraad* (O) 133-134.

<sup>25</sup> *Brian Lackey Trust* (C) para 40. See also *Phillips* (ZAECGHC) para 21.

<sup>26</sup> *Rand Waterraad* (O) 133.

<sup>27</sup> *Brian Lackey Trust* (C) para 40.

<sup>28</sup> *Roseveare* (ZAGPJHC) para 15 fn 6. The same problem exists in the case in para 20 fn 15.



It should be highlighted that there are marked differences between nuisance law and the law regulating encroachment that simply cannot be ignored. For one, an encroaching structure neither results from the normal use of property nor is it lawful in terms of the infringement of rights that it causes to a neighbour. Furthermore, conduct resulting in alleged nuisance cases is not *per se* unlawful, whereas the mere fact that the encroachment factually exists is in itself unlawful. On the basis of this distinction between encroachment cases and alleged nuisance disputes, it is important to differentiate between the application of reasonableness in the different contexts.

Consequently, reference to the principle of reasonableness in the context of encroachment law simply cannot mean the same thing as reasonableness in the quest for establishing if a neighbour's conduct is unreasonable and therefore unlawful. The idea of reasonableness that is centred on notions like mutual forbearance and accommodation - which is usually associated with nuisance law - cannot find application in cases where a neighbour physically invades the other's land by unlawful building works. It simply must be concluded, therefore, that reasonableness in the context of nuisance law and reasonableness as meant in encroachment cases are different.<sup>29</sup>

It seems more likely that what courts have in mind when they speak about reasonableness in the context of encroaching structures is fairness, so that the most equitable solution is sought by assessing the harm, loss or inconvenience for either party in an encroachment case.<sup>30</sup> What courts are called upon to do is to weigh up in every individual case the possible harm or loss for the encroaching owner should demolition be ordered, as opposed to the possible harm or loss for the affected landowner if demolition is denied. The encroaching landowner would therefore not be relying on a right, but would be asking the court to consider the fact that the rigid enforcement of the common law remedy of removal might possibly lead to a grossly unjust outcome. This approach was recognised in *Brian Lackey Trust*, where

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<sup>29</sup> Van der Walt 2008 *SALJ* 600. In this regard, I rely on the work of Van der Walt, who made this point in his contribution in said journal.

<sup>30</sup> *Rand Waterraad* (O) 130; *Brian Lackey Trust* (C) paras 17-31; *Phillips* (ZAECHGHC) para 21.

the court reasoned that the strict application of the default remedy of removal could lead to unfair results and therefore should not be enforced without considering the facts.<sup>31</sup> The outcome in *Brian Lackey Trust* could possibly have been explained on the basis that the affected landowner was acting in bad faith by insisting on demolition when it was clear that he was willing to accept money in the first place.<sup>32</sup> In *Rand Waterraad*, the choice of an award of compensation could have been explained by an argument based on some form of prescription or estoppel, because there had been a long delay in bringing the application.<sup>33</sup> A delay of the nature evident in *Rand Waterraad* could also give an indication of acquiescence or lack of proof of a negative impact.

It seems as though the outcomes in both the *Rand Waterraad* and the *Brian Lackey Trust* decisions can therefore be explained at least to some extent with reference to the conduct of the affected landowner. The justification for awarding compensation instead of removal could (and should) probably be explained along these (doctrinal) lines instead of the incongruous use of the reasonableness argument. Or, at the very least, the court in *Rand Waterraad* with its specific reference to *billikheid*<sup>34</sup> should probably have explained its statement that *billikheid* has a normative content, especially in terms of how it relates to notions like reasonableness, equity and fairness in the context of encroachments. This may very well have clarified the use of these notions in the context of encroachments and prevented unnecessary confusion over the use of these concepts in current cases like *Roseveare*.

Scott (writing in the context of encroachment law) argues that equity or fairness in this respect necessitates a value judgement in every particular case.<sup>35</sup> She disagrees with the contention that so-called *billikheid* (as was stated in *Rand Waterraad*) has a normative content and finds it unnecessary for the court to have proceeded to an

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<sup>31</sup> *Brian Lackey Trust* (C) para 34.

<sup>32</sup> Van der Walt 2008 *SALJ* 607.

<sup>33</sup> See also *Higher Mission School Trustees v Grahamstown Town Council* 1924 EDL 354 362-363, where the court found that the mere fact that the plaintiff possibly should have known about the encroachment was not sufficient to succeed with a claim based on acquiescence.

<sup>34</sup> *Rand Waterraad* (O) 136.

<sup>35</sup> Scott 2005 *Stell LR* 361.

evaluation of equity, which tries to fit encroachment cases into the normal neighbour law framework.<sup>36</sup>

On the basis of the above arguments, it must be deduced that reasonableness should be used and understood in the different contexts differently. In encroachment cases, reasonableness must mean something other than a reciprocal duty to accept the encroaching structures, which is what reasonableness means in accordance with the normal nuisance law principles.<sup>37</sup> The preferable meaning of reasonableness in encroachment cases is similar to equity or fairness, requiring a balancing of the potential loss for the encroaching owner if demolition is ordered against the likely loss for the affected landowner if the encroachment is left intact.<sup>38</sup>

The distinction becomes important when one looks at the way in which it was applied in *Roseveare*. The principle of neighbourly toleration - which encompasses the idea of "give and take" and "live and let live" - is pivotal in determining whether the alleged conduct amounts to nuisance. On the other hand, the question of the adjustment of neighbour relationships on the basis of a wide discretion being exercised in the context of encroachment is based on and can be explained along doctrinal lines, which allows for a broadly equitable solution in terms of Roman-Dutch common law principles. To my mind, the way these two different subsections of neighbour law are dealt with (and are indistinguishable) using the same broad notions of reasonableness was again unnecessarily confusing in *Roseveare*.<sup>39</sup> This is problematic and calls for a clearer explanation of when the one meaning is being used as opposed to the other. This is especially important when the discretion is being exercised in the case of encroachments. The way in which the discretion was exercised in *Roseveare* is discussed in the subsequent section. Thereafter the outcome is scrutinised from both a traditional private law and from a constitutional law perspective.

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<sup>36</sup> Scott 2005 *Stell LR* 361.

<sup>37</sup> Van der Walt 2008 *SALJ* 600.

<sup>38</sup> *Rand Waterraad* (O) 130. See also Van der Walt 2008 *SALJ* 600; Temmers *Building Encroachments* 66.

<sup>39</sup> *Roseveare* (ZAGPJHC) para 20.

#### 4 The exercise of the discretion in *Roseveare*

In *Roseveare*, the court found that there were certain parts of the encroaching wall that were so intrusive that it simply needed to be pulled down.<sup>40</sup> However, with regard to the other part - specifically the part of the boundary wall after the kink - the court found that the encroachment was so minor that it should remain intact.<sup>41</sup> This illustrates how courts will generally exercise the discretion in the case of encroaching structures, although only the size of the encroachment was taken into account in this case. The decision confirms again (albeit indirectly) that the discretion to award compensation instead of removal of an encroaching structure does exist and that the discretion is wide and equitable and depends on the policy considerations at play in the particular case. In this regard the case is not novel and the decision is similar to the earlier *Rand Waterraad* and *Brian Lackey Trust* decisions.<sup>42</sup>

It is clear from the recent tendency of courts dealing with encroachment disputes that the discretion to award compensation rather than to order removal is more readily exercised in favour of the encroacher where policy considerations dictate such an outcome.<sup>43</sup> Moreover, it is trite law that the discretion is wide and equitable and dependant on the specific facts of the case.<sup>44</sup> Therefore, even the way in which the discretion was exercised - in other words demolishing one part and leaving another part intact - is in itself not surprising.

There are decisions that show that courts would be more willing to order that the encroachment remains intact in instances where the continued existence of the encroachment results in an insignificant impact on the affected landowner's property rights.<sup>45</sup> This would usually involve a case where there is an encroachment of a

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<sup>40</sup> *Roseveare* (ZAGPJHC) para 16.

<sup>41</sup> *Roseveare* (ZAGPJHC) para 16.

<sup>42</sup> See Temmers *Building Encroachments* 50-57.

<sup>43</sup> Temmers *Building Encroachments* 50-57. For examples of the type of policy considerations that have been taken into account when the discretion was exercised, see fn 92 below.

<sup>44</sup> *Rand Waterraad* (O) 139.

<sup>45</sup> In Temmers *Building Encroachments* 143-145, a distinction is drawn between significant and insignificant encroachments rather than small and large encroachments. This is to specifically

foundation of a wall or a really insignificant building encroachment that extends a few inches into the property of a neighbour, without any perceptible effect on his use and enjoyment of the property. However, in the case of larger encroachments, it usually causes a significant limitation on the rights of the affected landowner. This outcome could probably be explained (although this was not specifically done in this decision) by the fact that in the case of significant encroachments, the continued existence of the encroachment results in such an intrusion into the property rights of the affected landowner that it simply cannot be justified.<sup>46</sup> Therefore, it is more likely that courts will order demolition of the structure that has a significant impact on the affected landowners' rights.<sup>47</sup> However, it was confirmed in *Brian Lackey Trust* that the discretion is not limited to minor encroachments but that it may be exercised even in the case of significant ones.<sup>48</sup> In principle, it seems as though the way in which the discretion was exercised in *Roseveare* is acceptable. What is more interesting is the effect that the exercise of the discretion has on the affected landowner's property rights.<sup>49</sup>

Generally, in the case of encroaching structures, it is clear that the purpose of the remedy of removal is to restore the situation to the *status quo ante*. In other words, removal is ordered in order to eliminate the unlawful encroachment. By contrast, if the court decides that the encroachment should be left in place, the court legitimates the continuance of the encroachment, based on policy reasons. The encroacher is therefore allowed to continue occupying the part of the neighbour's property affected by the encroachment. However, the way in which encroachment cases were applied before *Roseveare* resulted in great doctrinal uncertainty, especially in relation to the effects of keeping encroaching structures in place. For the most part, courts were silent about the rights of the respective parties to the

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include instances where the encroachment itself is small, but the effect or impact that the continued existence of the encroachment has is significant in relation to the affected landowner's rights. However, the court in *Roseveare* does not use any authority to show why it would be justified in leaving insignificant encroachments in place.

<sup>46</sup> *Phillips* (ZAECGHC) para 21. See also Temmers *Building Encroachments* 144.

<sup>47</sup> There are cases in which even large encroachments were left intact, but then there were always other factors indicating that demolition would not be the appropriate remedy in the circumstances. See *Rand Waterraad* (O); *Brian Lackey Trust* (C).

<sup>48</sup> *Brian Lackey Trust* (C) para 29.

<sup>49</sup> See Temmers *Building Encroachments* 109-111.

affected land if the encroachment was left intact. The question that still needs to be asked today is: What happens when the court denies the demolition order but says nothing about the rights of the respective landowners in an encroachment dispute? In other words, if a court leaves an encroachment in place on policy grounds but says nothing about the land incorporated by an encroaching wall, what happens in terms of the rearrangement or reallocation of rights with regard to the land encroached upon? Up to now the courts have in fact left the door open concerning any re-allocation of rights concerning the affected land. In a few limited instances, mention was made of the transfer of the ownership of the land encroached upon. For example, in the case of *Phillips v South African Parks Board*<sup>50</sup> the court actually considered ordering transfer of the land to the encroacher.

In *Phillips*, a predator-proof fence was erected on the property of the applicant. The fence resulted in a substantial section (the SANParks portion) of the applicant's property being incorporated as part of the respondent's land. The applicant sought to have the fence removed and/or relocated to the boundary at the expense of the respondent. The Eastern Cape High Court had to decide whether it would exercise its discretion in favour of the applicant (and order relocation of the fence) or in favour of the respondent (in which case the encroachment would be left in place in exchange for compensation). The respondent argued that if the court decided that the encroachment should be left in place, it should also make an order to the effect that ownership of the SANParks portion should be transferred to the respondent.<sup>51</sup> The court balanced the interests of both parties in the dispute and came to the conclusion that the encroachment should be removed so that the outcome would not be disproportionately prejudicial.<sup>52</sup>

With regard to the order for the transfer of ownership, the court found that if the encroachment remained intact there would not be a compelling reason to justify the deprivation of property that would result if the transfer of the ownership of the

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<sup>50</sup> *Phillips (ZAECGHC)*.

<sup>51</sup> *Phillips (ZAECGHC)* para 21.

<sup>52</sup> *Phillips (ZAECGHC)* para 51.

SANParks portion took place.<sup>53</sup> Therefore, such an order would have had the effect of a forced sale of the applicant's land, which would not be justified under section 25(1) of the Constitution.<sup>54</sup> In the end, the court decided the case based on the fact that the respondent could not prove that its prejudice or other reasons for not demolishing the encroachment was stronger than the prejudice that the applicant would suffer if the encroachment was left intact.<sup>55</sup> Therefore, it avoided having to answer the important question of what would happen in terms of the rights of the respective parties to the encroached-upon land if the court had exercised its discretion in favour of leaving the encroachment in place.

In the *Phillips* case, the question would have been who would own the SANParks portion if removal was denied and replaced with a compensation award. And does the court have the power to order transfer of the encroached-upon land in the event that policy reasons dictate that the encroachment should be left intact? These questions are crucial in cases where policy reasons dictate that compensation instead of removal is a serious option, as the court did in *Roseveare* and the earlier *Rand Waterraad* and *Brian Lackey Trust* judgments.<sup>56</sup> In this regard, it remains unclear whether the discretion authorises only the replacement of injunctive relief with compensation (which could result in the effective transfer of use rights) or in addition gives the court the power to order that ownership of the affected land be transferred to the encroaching owner.<sup>57</sup>

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<sup>53</sup> The constitutional implications are discussed in 6 below.

<sup>54</sup> *Phillips* (ZAECGHC) para 51.

<sup>55</sup> *Phillips* (ZAECGHC) para 24. From *Phillips* it can be deduced that courts will follow a policy-driven approach when exercising their discretion in encroachment disputes. Courts will balance the interests of both parties to determine whether removal or compensation would be the most appropriate remedy. In doing so, they will take cognisance of the right of removal, but keep in mind that this right is by no means conclusive any more. Courts may refuse to grant an order for removal if policy reasons dictate that the most appropriate remedy is compensation instead of removal.

<sup>56</sup> The court in *Phillips* does not say what would happen in terms of the rights of the parties to the land encroached upon if the court were to exercise its discretion in favour of leaving the encroachment in place. Fortunately, it was unnecessary in that case because the court in fact did order removal of the encroachment. For an explanation of the potential doctrinal implications and the arguments raised to possibly address the doctrinal equivocation, see Temmers *Building Encroachments* ch 4.

<sup>57</sup> Boggenpoel 2013 *THRHR* 317-320; Boggenpoel 2012 *Stell LR* 262.

*Roseveare* is interesting because it adds another dimension to the already problematic situation when encroachments remain intact. The question that arises from the outcome in *Roseveare* is whether or not the court has the power to create a servitude in favour of the encroacher in instances where compensation is ordered. It is not entirely clear from the decision itself on what basis the court assumes the power to additionally order that a servitude be created to preserve the existing situation. This needs to be investigated further.

In the next section it will be important to consider the nature of the right that is created in this regard. The servitude is obviously created by court order against the will of the affected landowner. This may have far-reaching implications that need to be examined, especially in terms of the traditional private law doctrine regulating encroachments. The creation of the servitude against the will of the affected landowner may also have constitutional implications in terms of section 25(1) of the *Constitution*, which will be scrutinised in the penultimate section of the note. Of specific importance here is the forced transfer of rights in property, which needs to comply with section 25(1).

## **5 The nature of the right created in *Roseveare***

Willis J ordered that "a servitude be registered against the plaintiff's property in favour of the defendant".<sup>58</sup> Therefore the court ordered that a servitude be granted in respect of the part of the plaintiff's property that was incorporated as part of the defendant's land as a result of the encroaching wall. Although this could probably be seen as a triumph in terms of the explanation of the consequences of exercising the discretion in favour of leaving the encroachment in place, it now becomes important to consider the nature of the right created in this regard.

It is clear that the creation of a servitude in the context of encroaching structures is not surprising from a historical perspective. In terms of Roman-Dutch law, Voet,<sup>59</sup>

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<sup>58</sup> *Roseveare* (ZAGPJHC) para 23.

<sup>59</sup> Voet 8 2 6.



Van Leeuwen<sup>60</sup> and Grotius<sup>61</sup> allude to the fact that a servitude could rectify what the encroachment had caused, specifically in instances where the encroachment is left intact according to the courts' discretion. Van Leeuwen writes that the right to have your balcony, bow-window or gallery projecting over the land of your neighbour was obtained by way of servitude.<sup>62</sup> The specific servitude in this case was the *servitus protegendi*. Without a servitude of this nature, you (as the encroaching landowner) would have no right to have the eaves or roof of your house projecting over the land belonging to another and would be compelled to remove it. Grotius also noted that a praedial servitude could be acquired through prescription if an encroachment had stood without objection for a certain time and demolition was out of the question.<sup>63</sup> Therefore if someone had erected a building on the property of another and no objection had been made within a certain period of time, a praedial servitude would come into being and the affected landowner would have to accept the existence of the building in exchange for damages.<sup>64</sup> In both these instances it is clear that where the encroachment is not removed, a servitude is created so that the rights of the respective parties with regard to the encroached-upon land are clarified.

This explanation was used even in early South African case law to illustrate what the affected landowner obtained when the court exercised its discretion in favour of the encroacher and left the encroachment in place. In instances where the court exercised its discretion in favour of the encroacher on the basis of the year and a day rule, the court would generally order that a praedial servitude came into existence in favour of the encroacher in exchange for compensation.<sup>65</sup>

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<sup>60</sup> Van Leeuwen *RDL* 2 20 6.

<sup>61</sup> Grotius 2 36 5.

<sup>62</sup> Van Leeuwen *RDL* 2 20 6.

<sup>63</sup> Grotius 2 36 5. This was confirmed by Van Leeuwen *RDL* 2 19 4.

<sup>64</sup> Grotius 2 36 5.

<sup>65</sup> For cases dealing with the year and a day rule, see *Adam v Abdoola* 1903 24 NLR 158; *Wade v Paruk* 1904 25 NLR 219; *Stark v Broomberg* 1904 CTR 135; *Frank and Co v Duveen* 1919 CPD 299; *Higher Mission School Trustees v Grahamstown Town Council* 1924 EDL 354; *Cape Town Municipality v Fletcher & Cartwrights, Ltd* 1936 CPD 347; *Braunschweig Village Management Board v Frohbus* 1938 EDL 25; *Naudé v Bredenkamp* 1956 2 SA 448 (O). However, the applicability of the year and a day rule to South African law was specifically denied in *Waterraad v Bothma* (O) 126-130. See also Van der Merwe and Cilliers 1994 *THRHR* 588.

From a comparative law point of view, it is also not unexpected to create a servitude in this context. In this regard, there is at least one jurisdiction that could have been used as support for the conclusion reached by Willis J in *Roseveare*.<sup>66</sup> The *Dutch Civil* code provides for a servitude to come into existence to preserve the existing situation in a case where an encroachment remains intact. In terms of *BW* 5:54, if a building encroachment is erected and removal of the encroachment would be disproportionately more prejudicial to the encroacher than the disadvantage of the existing situation for the affected landowner, then the encroachment should not be removed. Furthermore, in instances where this balancing of interests results in the encroachment being left in place, the encroacher can demand that a servitude be granted to preserve the existing situation, in exchange for compensation.<sup>67</sup>

Therefore it was probably expected in the context of South African law that the use right that ostensibly comes into being when an encroachment is not removed would take the form of a servitude created in favour of the encroacher.<sup>68</sup> It is interesting to consider exactly the type of servitude that comes into being, in order to determine what the implications are of creating a servitude of this nature in this context. In this regard, one can make a few interesting observations concerning the nature of the servitude created.

Firstly, the servitude seems to be a personal servitude created in favour of the defendant in her personal capacity. Based on a literal interpretation of the words "the plaintiff is to register a servitude in *favour of the defendant* of the remaining area of the encroachment"<sup>69</sup> it can probably be deduced that the benefit that the defendant is meant to derive is for her personal capacity and not in her capacity as owner of a dominant tenement.<sup>70</sup> Consequently, it seems as though a personal servitude is supposed to be created against the plaintiff's property (the servient land) in favour of the defendant. Therefore, in principle if the defendant dies or if ever she sold her property, the servitude should also come to an end. However, I

<sup>66</sup> See Temmers *Building Encroachments* 195-201.

<sup>67</sup> *BW* 5:54.1.

<sup>68</sup> Temmers *Building Encroachments* 224.

<sup>69</sup> *Roseveare* (ZAGPJHC) para 24. Author's own emphasis.

<sup>70</sup> Van der Merwe *Sakereg* 459.

think that what the court had in mind here is rather the creation of a praedial servitude; one that would benefit and burden the respective properties.<sup>71</sup> In doing so, the situation would be preserved as is and the servitude would exist in perpetuity. From a practical point of view, this seems to make more sense than the creation of a personal servitude.

Another important aspect about the servitude created in this case is the fact that it was created by court order against the will of the affected landowner.<sup>72</sup> The plaintiff was compelled to register a servitude against his property in favour of the defendant and to bring the title deed in line with the court order. It is clear that new praedial servitudes may be created as there is no *numerus clausus* of praedial servitudes.<sup>73</sup> In these instances there are strict requirements that need to be complied with in order to ensure that ownership of land is not excessively burdened by praedial servitudes.<sup>74</sup> However, in the above instances the assumption is that both parties agree to the creation of the servitude. Praedial servitudes are usually created by way of agreement between the dominant and servient tenement owners.<sup>75</sup> It is the creation of a servitude against the will of the servient tenement that is problematic. Nonetheless, there are servitudes that are indeed created against the will of a landowner in terms of the common law. A typical example of this is the right of way of necessity (or *via necessitatis*). However, it is submitted that the creation of a right of way of necessity is authorised in terms of the common law.<sup>76</sup> Conversely, the authority for the creation of a servitude in the context of encroachments is not at all clear. In the absence of clear authority from which the court's power purportedly derives, this outcome may run into constitutional difficulties.<sup>77</sup> The classification of the servitude that was created in *Roseveare*, namely that it is a praedial servitude

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<sup>71</sup> The only problem with identifying the servitude that is created as a praedial servitude is the requirement of *perpetua causa*. In terms of this requirement, a praedial servitude must be able to continuously fulfil the need of the dominant tenement. A praedial servitude is therefore not linked to a specific owner, but to all successive owners of the dominant tenement. See De Waal "Servitudes" 793-795.

<sup>72</sup> Van der Merwe *Sakereg* 525. Van der Merwe recognises that servitudes can be created by court order. A right of way of necessity is provided as an example.

<sup>73</sup> De Waal "Servitudes" 789.

<sup>74</sup> De Waal "Servitudes" 789.

<sup>75</sup> Badenhorst, Pienaar and Mostert *Silberberg & Schoeman* 328.

<sup>76</sup> See Van der Merwe *Sakereg* 525.

<sup>77</sup> See 6 below.

created by court order against the will of the affected landowner, therefore has constitutional repercussions. The interesting question here is if the unilateral creation of a servitude in favour of the encroacher would pass constitutional scrutiny under section 25(1). This is discussed in the following section.

## 6 The constitutionality of the outcome in *Roseveare*

Section 25(1) of the *Constitution* provides that no one may be deprived of property except in terms of law of general application and no law may permit the arbitrary deprivation of property. A section 25(1) analysis is imperative to encroachment disputes, because it is important to consider whether or not the loss of property rights that occurs when encroachments are not removed is constitutionally compliant. More specifically, a section 25(1) analysis becomes directly relevant where a court creates a right or entitlement in favour of the encroacher that did not exist before, or transfers a right or entitlement from the affected landowner to the encroacher against the affected landowner's will. It should be remembered that the court in *Roseveare* exercised its discretion in favour of leaving a part of the boundary wall in place<sup>78</sup> and ordered that the plaintiff should compulsorily register a servitude in favour of the defendant's land.<sup>79</sup>

If one considers the property rights that are affected in the case where a servitude is created without the consent of the affected landowner,<sup>80</sup> it is clear that the affected

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<sup>78</sup> Gildenhuys argues that imposing a limitation on a landowner without his or her consent could arguably be seen as an expropriation of a use right or possibly, a servitude. See Gildenhuys *Ontheieningsreg* 61, 70-71. In contrast, Van der Walt rejects the idea that expropriation takes place in this regard. See Van der Walt *Constitutional Property Law* 346.

<sup>79</sup> This section will not contain a discussion of the constitutional implications of courts exercising the discretion in favour of leaving encroachments in place in general. The focus of this section is rather on the constitutional implications of the court's creation of a servitude with regard to the continued existence of the encroachments, as was illustrated in *Roseveare*. For a discussion of the constitutional implications of court orders in the context of encroachments in general and in so far as courts have ordered the transfer of ownership of the affected land, see Temmers *Building Encroachments* ch 5; Boggenpoel 2012 *Stell LR* 259-263; Boggenpoel 2013 *THRHR* 315-317.

<sup>80</sup> There are similarities that can be drawn between the cases where a specified servitude of right of way is unilaterally relocated by court order. See *Linvestment CC v Hammersley* 2008 3 SA 283 (SCA). See specifically Kiewitz *Relocation of a Specified Servitude* 73-108, where Kiewitz sets out the constitutional implications of court orders that allow for unilateral relocation of a specified right of way without the consent of the servient tenement landowner.

owner loses the right to the use and enjoyment of his property, but also his right of disposal with regard to the particular portion of land.<sup>81</sup> These entitlements are transferred from the affected landowner to the encroacher, or *created* in favour of the encroacher at the expense of the affected landowner. Therefore it is clear that there is 'property' involved, for the purposes of section 25 of the *Constitution*.

The question concerning the deprivation of property then becomes relevant. In the earlier *Phillips* decision, the court recognised that the loss of property that would occur if an order were made for the transfer of the SANParks portion to the respondent would result in a deprivation of property for the purposes of section 25. The court stated that:<sup>82</sup>

It is indisputable that an encroachment of the nature in issue in the instant case constitutes an interference with the applicant's property rights such as to constitute a deprivation in terms of the provisions of section 25 of the *Constitution*.

Although the deprivation applicable in *Phillips* consisted of the potential loss of ownership of the property affected by the encroaching fence, it must be accepted that the loss of the entitlements of use, enjoyment and disposal that were transferred from the affected landowner to the encroacher also amounts to the deprivation of property.<sup>83</sup> Accordingly, the question is whether or not this deprivation is consistent with section 25(1).

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<sup>81</sup> Van der Merwe *Sakereg* 173.

<sup>82</sup> *Phillips* (ZAECGHC) para 24.

<sup>83</sup> In *Nhlabathi v Fick* 2003 2 All SA 323 (LCC) para 29, the Land Claims Court found that even where a landowner's loss of the entitlement of use and enjoyment pertained to a small portion of the affected landowner's property, it would still constitute a deprivation in terms of s 25(1) of the *Constitution*. See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*; *First National Bank of SA Ltd t/a Minister of Finance* 2002 4 SA 768 (CC) para 100; *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bisset v Buffulo City Municipality*; *Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) para 33; *Reflect-All 1025 CC v MEC for Public Transport Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) paras 35-38; *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC) paras 38-46. See also Van der Walt *Constitutional Property Law* 203-213.

In terms of section 25(1), there are two requirements that need to be met. Firstly, the deprivation must be in terms of law of general application and secondly, the law may not allow for an arbitrary deprivation of property.<sup>84</sup> The law of general application regulating encroachments is the common law.<sup>85</sup> The common law allows in certain instances that a court may deviate from the default remedy of removal and award compensation instead. The deprivation caused by merely awarding compensation instead of removal may therefore in principle be authorised by the common law.<sup>86</sup> However, it is not entirely clear where the power to create a servitude in this context comes from; or whether it in fact derives from Roman-Dutch law as illustrated above.<sup>87</sup> Consequently, as far as the authority for such an order is concerned, it seems unlikely that the common law authorises this kind of court order. In the absence of clear authority in this regard, courts should probably - in the same way as with an order to transfer ownership - avoid outcomes like these, because they may be unconstitutional in terms of section 25(1), based on the lack of legal authority for such an order.<sup>88</sup> In this regard, it cannot be said that the same discretion to replace the remedy of removal with compensation in terms of common law automatically includes the power to create a servitude against the will of the affected owner.<sup>89</sup> If the affected landowner does not want to create a servitude in favour of the encroacher, such an order for a compulsory creation of the servitude can simply not be made. The deprivation that results from this outcome may

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<sup>84</sup> Section 25(1) of the *Constitution*.

<sup>85</sup> Both *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 44 and *S v Thebus* 2003 6 SA 505 (CC) paras 64-65 provide authority for the fact that the common law is law of general application. In the *Phillips* case it was also reiterated that "law of general application includes the common law". See *Phillips* (ZAECGHC) para 23.

<sup>86</sup> See section 5 above.

<sup>87</sup> See section 5 above. The decision itself does not provide any authority for the creation of the servitude in this regard. There are servitudes that are created against the will of a landowner in terms of the common law, like the right of way of necessity (or *via necessitatis*). However, the creation of a right of way of necessity is authorized in terms of the common law, therefore the authority is clear and the requirement of law of general application is the common law. See Van der Merwe *Sakereg* 525. Apart from servitudes created by court order in terms of the common law, there are also servitudes that are created against the will of a landowner in terms of legislation. S 28 of the *Sectional Titles Act* 95 of 1986 contains certain servitudes that are implied in favour of/and against section. These servitudes are implied and are therefore created against the will of the sectional title owners.

<sup>88</sup> Boggenpoel 2013 *THRHR*.

<sup>89</sup> The same arguments were made with regard to the authority for an order that causes the transfer of ownership of the land encroached upon. See Temmers *Building Encroachments* 95-99; Boggenpoel 2012 *Stell LR* 262.

therefore be unlawful on the basis that the common law does not authorise the deprivation and it is therefore in conflict with section 25(1).

Furthermore, the deprivation may also be unconstitutional because it does not comply with the arbitrariness requirement in section 25(1). Non-arbitrary deprivation on a substantive level requires that there should be sufficient reason for the deprivation, whereas non-arbitrary deprivation on a procedural level requires that deprivation must not be procedurally unfair.<sup>90</sup>

In terms of substantive arbitrariness, Ackermann J in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>91</sup> applied a number of factors to determine whether sufficient reason exists for the deprivation.<sup>92</sup> The factors become immensely helpful when enquiries into the constitutionality of deprivations are at issue.

With regard to encroachment disputes, the substantive arbitrariness requirement has two dimensions. Generally, there should be sufficient reason for the institutional shift from the common law remedy of removal to an award of compensation instead. In addition, there should be sufficient reason for the creation of a servitude against the will of the affected landowner. It is specifically the justification for the creation of the servitude in favour of the encroacher that is problematic here.

It is clear that the justification for denying the default remedy of removal and awarding compensation instead is relatively easy to deduce from case law, in which this shift was made. Under the broad rubric of fairness and equity courts generally justify the exercise of the discretion in favour of leaving the encroachment in place. The reasons that are generally provided to justify ordering compensation rather than

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<sup>90</sup> The deprivation that results from the transfer order is brought about by court order. Therefore, in principle procedural fairness should not feature at all in the case of court orders made for the forced transfer of the land encroached upon. For a discussion of procedural arbitrariness, see Van der Walt 2012 *Stell LR* 94.

<sup>91</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 4 SA 768 (CC) (hereafter *FNB (CC)*).

<sup>92</sup> *FNB (CC)* para 100.

removal in the case of encroachments are the insignificance of the encroachment or policy reasons such as the balance of convenience.<sup>93</sup> The policy reasons specific to the case would indicate if a decision to leave the encroachment in place was justified, and would also provide the justification for the deprivation that results. In this regard, there may very well be sufficient reasons to justify the deprivation that takes place when the shift is made from the common law remedy of removal to an order for compensation instead. However, it is not entirely self-evident that there will be sufficient justification for the order that results in a servitude being created in favour of the encroacher.

It is clear that no specific (or separate) justification is given in *Roseveare* for an additional order in terms of which property rights are transferred - when a servitude is created - from the affected landowner to the encroacher. It is exactly this outcome that requires greater justification in terms of *FNB*. "According to section 25(1), it is more difficult to justify the outcome where a court orders transfer of the encroached-upon land [or creates a servitude] in any event, because the affected right is ownership [or incidents of ownership] for which a more compelling reason is required in terms of *FNB*."<sup>94</sup> It seems as though the servitude was probably created to establish legal certainty with regard to the land encroached upon. However, no clear justification was advanced in *Roseveare* for combining the compensation order with the compulsory transfer of the entitlement of use and disposal. Therefore, on this general level, the non-arbitrariness requirement in section 25(1) is evidently not met by an order for the creation of a servitude to rectify the encroachment, even when there may be sufficient justification for the ordering of compensation instead of removal. This is, of course, unless we are to assume that the same justification for an order replacing removal with compensation applies to an order in terms of which a servitude is unilaterally created in favour of the encroacher. However, this is

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<sup>93</sup> The policy reasons may include the balance of harm or loss for either party, the unfairness of ordering demolition (*Rand Waterraad* (O) 138; *Brian Lackey Trust* (C) paras 36-37, 51; *Phillips* (ZAECGHC) para 51), *mala fide* behaviour by either party involved in the dispute (*Brian Lackey Trust* (C)), tardiness in bringing the application (*Rand Waterraad* (O) 138), whether the loss will result in people's homes being demolished (*Wrotham Park Estate Co Ltd v Parkside Homes Ltd* 1984 1 WLR 798 (UK)) or any other factor that may help to provide a more compelling reason for the deprivation.

<sup>94</sup> Boggenpoel 2013 *THRHR* 322. See also *FNB* (CC) para 100.



not clear and the argument should probably be avoided because of the possibility of constitutional infringement.

The substantive non-arbitrariness requirement should also be complied with on a personal level, which means that an assessment must be made of the impact that the deprivation has on the individual landowner's property rights and whether or not there is sufficient reason to justify the deprivation in this regard. Again, this needs to be justified in terms of the order replacing injunctive relief with compensation, and the order for the creation of the servitude. To this end, a proportionate balance must be struck between the individual rights of the encroacher and those of the affected landowner. The proportionality evaluation has to favour the creation of a servitude, made against the will of the affected owner. In other words, the balance of harm must be on the side of the encroacher, and the creation of a servitude must be able to balance out the negative effect that the decision not to order removal has on the affected landowner's rights, even if the creation of the servitude takes place against the owner's will and without his consent. If this goal is reached, a court would be justified (in other words, it would not be substantively arbitrary) to order compensation rather than removal in the case of encroachment and also to grant a servitude against the affected owner's will. Again, although the proportionate balance may be relatively self-evident in the case of the general discretion to replace injunctive relief with compensation, striking this balance in the case of the order for the creation of the servitude requires even stronger justification in terms of the *FNB* decision.<sup>95</sup> In this regard, it simply must be assumed that - on an individual level - this order requires its own (more stringent) justification because of the affected

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<sup>95</sup> *FNB* (CC) para 100. In *FNB* (CC) it was stated that a more compelling reason is needed when the deprivation affects ownership of land or corporeal movables. Furthermore, courts should consider the effect of the deprivation on the incidents of ownership. Where all the incidents of ownership are affected, or only some incidents are affected completely, a more compelling reason is required to justify the deprivation that results. In *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bisset v Buffulo City Municipality*; *Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) para 33, the Constitutional Court found that even if it is only one incident of ownership that is affected by the deprivation, that incident of ownership may be a significant element of ownership. Therefore, depending on the circumstances in the particular case, greater justification may be required even in the case where only one incident of ownership is affected by the deprivation.

landowner's complete loss of entitlements. Such a justification was not provided in *Roseveare*.

On both the general and the individual level, it will often be justified (and therefore not arbitrary), to order compensation instead of removal of the encroachment. However, on both levels it seems unlikely that creating a servitude with regard to the land encroached upon would ever be justified sufficiently to prevent such an order from being arbitrary under section 25(1). Considering that such an order requires even stronger justification in terms of the *FNB* decision, it seems that the creation of a servitude against the will of the affected owner may well be arbitrary in all cases, even when the compensation order is justified and thus not arbitrary.

## **7 Conclusion**

The outcome of the recent case of *Roseveare v Katmer* provides an interesting (though possibly constitutionally problematic) perspective on the encroachment problem in South African law. The decision has opened the door for courts to create servitudes in instances where encroachments are left intact. In other words, where courts decide to leave encroaching structures in place - based on policy reasons - it seems as though they may now in addition order that a servitude be registered in favour of the encroacher against the affected landowner's property. Although this eliminates the on-going conundrum in encroachment law concerning the rights of the respective parties to the affected land in instances where encroachments are not removed, it seems as if the solving of this problem may have created another one.

The court in *Roseveare* created a servitude in favour of the defendant against the plaintiff's property. Although the servitude is evidently in the nature of a personal servitude, it seems more likely that what the court had in mind was the creation of a praedial servitude to justify the continued existence of the encroachment when demolition was denied.

What is clear is that the servitude was created by court order against the will of the affected landowner. At common law, the creation of a servitude in this respect does not exist. Therefore the authority from which the power derives to make an order like this is not entirely clear. In fact, the court does not provide any authority for the creation of the servitude in favour of the encroacher. This may have serious constitutional implications.

For one, lack of authority for the deprivation that results may be unconstitutional because there is no law of general application that authorises the deprivation in terms of section 25(1). In this regard, the creation of a servitude to explain the continued existence of the encroachment is not automatically included in the general discretion to replace removal with compensation. Furthermore, an order creating a servitude against the affected landowner's will needs to be separately justified in terms of the non-arbitrariness requirement in section 25(1). Moreover, the justification that is required in this regard is on a general as well as a personal level. In this note it is argued that an order that forces the affected landowner to register a servitude in favour of the encroacher to preserve the existing encroachment situation will be in conflict with section 25(1), as far as the common law does not authorise such an order. In addition, the order will be unjustified and therefore arbitrary on both a general and personal level.

In my view the decision is undoubtedly a step in the right direction, at least as far as the court has attempted to provide clarity in terms of the rights of the respective parties regarding the land encroached upon. However, in the absence of authority either in terms of the common law or legislation to create a servitude in this context, courts should avoid orders of this nature, because they may create more problems than they aim to address. It is clear that the common law does not provide the necessary authority. However, if legislation is enacted to regulate building encroachments, it may be useful to explain in such legislation what happens when the encroachment is not removed, and the legislation may also provide the required law of general application to prevent constitutional infringement. The legislation should specify the nature of the right acquired by the encroacher, which in the South

African context should probably be a servitude created against the affected landowner's property. This would ensure that the required authority existed for the creation of the servitude in this context, and would also provide the necessary justification to prevent the arbitrary deprivation of property. The unnecessary confusion that results from the inability to explain the outcome (or provide sufficient reason) on the one hand, and the possible constitutional infringement due to the lack of authority on the other, could be cleared up by the suggested legislation.

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**List of abbreviations**

CC	Constitutional Court
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg